Docket No. 34162

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE BOOK EXCHANGE, INC.,
a West Virginia corporation,

Plaintiff Below - Appellant,

v.

WEST VIRGINIA UNIVERSITY, through the WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, a corporation; NARVEL G. WEESE, JR., individually; and BARNES & NOBLE COLLEGE BOOKSELLERS, INC., d/b/a WEST VIRGINIA UNIVERSITY/DOWNTOWN BOOKSTORE, WEST VIRGINIA UNIVERSITY EVANSDALE BOOKSTORE, WEST VIRGINIA UNIVERSITY/LAW BOOKSTORE, and WEST VIRGINIA UNIVERSITY/HEALTH SCIENCES BOOKSTORE,

Defendants Below – Appellees,

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF OF APPELLEES WEST VIRGINIA UNIVERSITY AND NARVEL G. WEESE, JR.

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I. INTRODUCTION

In its complaint, The Book Exchange, Inc. ("The Book Exchange") challenged a credit arrangement created by West Virginia University ("WVU") for the benefit of financial aid students. According to the allegations in the complaint, the students received notice of the credit program, and were given the right to opt out. The complaint gives detailed allegations as to how and when notice was given for the fall 2005 semester. There are no allegations that students are precluded from purchasing text books at The Book Exchange's bookstore by use of the students' financial aid funds in excess of the credit account amount, by personal check, or by personal credit cards.

The complaint alleged that the program violated ten statutes. On appeal, The Book Exchange has conceded that it had no basis for seeking recovery under any of the ten statutes. Nevertheless, The Book Exchange continues to maintain that an unidentified portion of the ten alleged statutory violations are relevant, because some other party may have had rights of review, and that could give rise to tortious interference with the business expectancies of The Book Exchange.

In its brief, The Book Exchange does not address any of the defects in its contention that other parties may have claims under the statutes. There is no analysis showing that any of the detailed allegations could, under any view, constitute a violation of any of the statutes. Instead, The Book Exchange adopts two strategies to justify evasion of analysis of its statutory claims. First, The Book Exchange focuses on volume. The Book Exchange stresses that its complaint is very lengthy and asserts that many statutes are violated. The Book Exchange asks the Court to conclude that in any complaint so voluminous and lengthy and citing so many statutes, something, somehow, somewhere must surely constitute a valid claim. Second, The Book

Exchange focuses on its own legal conclusions. The Book Exchange notes that its complaint alleged many, many times and in many different phrases, that the credit program was illegal or tortious. The Book Exchange assumes that alleging that an act is tortious is the same as alleging a tortious act. The complaint and brief are therefore rife with characterization of, and legal conclusions about, the acts alleged, but bereft of actual legal analysis of the acts.

The detailed factual allegations, as distinct from the legal conclusions as to the effect of those factual allegations, allow this Court (and allowed the circuit court) to make the legal judgment necessary for ruling on the motion to dismiss. The Book Exchange has detailed knowledge of, and made detailed allegations regarding, the actual mechanics and working of the credit program. The circuit court was in a position to evaluate whether the allegations could potentially amount to a statutory violation or other tortious act that would be necessary to support its claim that the credit arrangement was not merely an act of competition giving a commercial advantage, but "tortious interference" with the business expectancies of The Book Exchange.

The open and obvious nature of the credit program and the detailed description given of it in the complaint defeat the alternative arguments of The Book Exchange that the circuit court should have given time for more discovery (thousands of documents had already been produced by WVU) or allowed the complaint to be amended. As to the discovery requests, The Book Exchange did not seek additional discovery in the proceedings below until after the circuit court announced its ruling. More importantly, neither the discovery nor the request to amend the complaint was supported by any suggestion as to how or why discovery might help or what amendment might make a difference. The complaint was not based on a bare bones assertion that WVU "undertook a variety of actions that tortiously interfered" with the rights of The Book

Exchange. To The Book Exchange's credit, it gave explicit descriptions of the actions at issue. There was, therefore, no need to seek out further information on what WVU did, and The Book Exchange has identified no such need. Nor has The Book Exchange suggested, even now, what amendment could occur that would make any difference. Thus, the complaint was properly dismissed several months after its filing, because The Book Exchange provided no explanation or even suggestion as to how more time would alter the outcome.

II. STATEMENT OF FACTS

The statement of facts by The Book Exchange makes no distinction between factual allegations and its characterizations of those factual allegations. WVU will not respond to or correct all of the improper characterizations in The Book Exchange's brief, but will set forth the well-pleaded allegations of the complaint.

In 2001, WVU contracted with Barnes & Noble to lease and run the WVU bookstores. (Compl. ¶ 7, Rec. at 2.) In 2006, WVU renewed its contract with Barnes & Noble. (Compl. ¶ 9, Rec. at 3.) Pursuant to those contractual agreements, WVU created and implemented the "Reserve Convenience Account" program. (Compl. ¶¶ 10-17, Rec. at 3-4.) The program began operation in the academic year 2005. (Compl. ¶¶ 13, 19, Rec. at 3-4.) The Book Exchange did not challenge the program until it filed its complaint on June 8, 2007, before the start of the academic year 2007.[1] (*See* Compl.)

The Reserve Convenience Account is a credit arrangement made available to eligible financial aid students by which students may purchase textbooks at the WVU Bookstore without

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[1] In its Statement of the Facts, The Book Exchange claims that since 1934, it has focused "on the sale of lower cost used books to WVU's neediest students, those on financial aid." (Appellant's Br. at 3.) This "fact," however, appears nowhere in the record of this case (even as an allegation), and, in any event, is irrelevant. It is undisputed in this case that The Book Exchange and WVU Bookstore are competitors regarding textbook sales to WVU students. (*See, e.g., id.* at 11.) It is not relevant that The Book Exchange now seeks to characterize its customers, without foundation, as the "neediest students."

setting up a credit account, or waiting for financial aid payments to reach their home, follow the student back to Morgantown, and be deposited there for use. Participation in the program is optional and WVU provides a notice and opportunity for students to opt out of the program. (Compl. ¶¶ 22, 24, Rec. at 5.) The complaint asserts that the notice is given near the end of the preceding academic term during the exam period.[2] (Comp. ¶¶ 22, 68, Rec. at 5, 12.)

The credit account is available for use only at the WVU Bookstore, but there is no credible claim that participants are prohibited from making textbook purchases from non-WVU suppliers, such as The Book Exchange, using their own funds. There also is no allegation that those financial aid funds available to the students in excess of the credit amount (set at $500 in 2007) are in any way restricted. Similarly, there is no allegation that the existence of the Reserve Convenience Account hinders a student's use of credit cards, debit cards, checking accounts, or other financial services to buy textbooks from competing bookstores during the existence of the credit arrangement at the WVU Bookstore.[3]

For participating students, those financial aid funds placed in the Reserve Convenience Account and not spent become available within approximately 14 days of the start of the term. (Appellant's Br. at 5.) There is no allegation that distribution of financial aid funds within 14 days of the start of the term violates any state or federal law covering distribution of financial aid.

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[2] To the extent that The Book Exchange characterizes WVU's notices as "confusing" and coming at "particularly busy times, with arbitrary deadlines," those are wholly The Book Exchange's self-serving characterizations that the circuit court was not bound to accept.

[3] Accordingly, The Book Exchange's assertion that "WVU students either are led to believe that they are required to purchase their textbooks from [appellees] or are otherwise forced to do so due to the lack of available textbook money to be spent at The Book Exchange" (Appellant's Br. at 4), is absurd and without foundation.

The complaint does not allege that WVU has said anything – improper or otherwise – to students specifically about The Book Exchange. The complaint also is devoid of any allegation that Defendants tried to confuse students about the identity of the two bookstores, or that any defendants attempted to steal trade secrets of The Book Exchange.

III. POINTS AND AUTHORITIES AND DISCUSSION OF LAW

A. The Standard Of Review.

Dismissal under Rule 12(b)(6) for failure to state a claim is reviewed *de novo* on appeal. *See, e.g., Highmark West Virginia Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) (*per curiam*). In resolving a Rule 12(b)(6) motion to dismiss, the Court ordinarily assumes the allegations stated in the complaint to be true, and construes that pleading in the light most favorable to the Plaintiff. *See, e.g., John W. Lodge Distr. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). Although the plaintiff is entitled to all reasonable inferences from the allegations, a court need not accept as true "legal conclusions, opinions, or unwarranted averments of fact." *Kopelman and Associates, L.C. v. Collins*, 196 W. Va. 489, 494, 473 S.E.2d 910, 914 (1996) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Motions to dismiss provide necessary relief in instances where a party requests relief that it cannot receive or attempts to enforce rights that it does not have. *State ex rel. McGraw v. Scott-Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (motion to dismiss under Rule 12(b)(6) "enables a court to weed out unfounded suits"). Accordingly, a motion to dismiss should be granted when the plaintiff cannot prevail on the legal theory put forth in the complaint. *See id.* (reviewing dismissal where the "sole issue [was] one of law and statutory construction"); *see generally Peoples Security Life Ins. Co. v. Hooks*, 367 S.E.2d 647, 650-51 (N.C. 1988) (upholding Rule 12(b)(6) dismissal of tortious interference claim and stating that "[a] motion under Rule 12(b)(6) should be granted when the complaint reveals that the

interference [with plaintiff's business] was justified or privileged" and recognizing "the general principle that interference may be justified when the plaintiff and the defendant are competitors"). Under these standards, the Circuit Court properly dismissed The Book Exchange's complaint under Rule 12(b)(6) because the detailed factual allegations do not constitute tortious interference. The repeated characterization of the acts alleged as being unlawful or tortious is irrelevant to whether the acts alleged actually meet the legal standard.

B. The Circuit Court Properly Dismissed The Book Exchange's Complaint Under Rule 12(b)(6) For Failure To State A Claim.

The Book Exchange initially asserted three counts in its complaint against WVU, Mr. Weese individually, and Barnes & Noble:

Count I alleged statutory violations;

Count II alleged tortious interference with business relations; and

Count III alleged civil conspiracy.

(*See* Compl. ¶¶ 42-95, Rec. at 7-16.) The Book Exchange now makes no argument that it can independently sustain any of its claims of alleged statutory violations in Count I, and, indeed, concedes that it cannot. (*See* Appellant's Br. at 20 (stating that The Book Exchange has admitted that it does not have independent causes of action for alleged statutory violations).) The Book Exchange similarly fails to make any legal argument that its claim of civil conspiracy in Count III was wrongly dismissed. The Book Exchange's sole argument regarding the Rule 12(b)(6) dismissal of its three counts is that it should be allowed to litigate its claim in Count II for tortious interference with business relations. As discussed below, The Book Exchange fails to show that any of the statutes relied on were violated or that any other factor made the credit arrangement wrongful or tortious.

1. Outlining The Elements Of Tortious Interference Does Not Cause The Factual Allegations To Fit Within The Ambit Of Tortious Interference.

As an initial matter, the propriety of the dismissal of The Book Exchange's complaint under W.Va. R. Civ. P. 12(b)(6) does not turn on whether the complaint was sufficient to put Defendants on notice of the claim. (*See* Appellant's Br. at 9 (contending that complaint provides enough information to outline claims); *id.* at 14 ("The complaint sets forth more than a sufficient amount of information to put appellees on notice regarding the tortious interference claim . . . ."); *id.* at 20 (contending that simply because elements of tortious interference are repeatedly recited in complaint, "the Book Exchange has stated a claim upon which relief can be granted").) No party raised any issue as to the adequacy of the complaint in that regard, given the detailed factual allegations.

Accordingly, The Book Exchange's discussion at pages 8 through 14 of its brief, regarding whether it sufficiently put Defendants on notice of its claims, is beside the point. The adequacy of notice is one necessary element of a proper complaint but it is not sufficient. A party that recites that it "was charged a usurious interest rate" in a consumer loan might sufficiently outline a usury claim. If the party made further allegations showing that the interest rate on the loan at issue was set at a rate *below* the statutory maximum, the "adequacy of the pleading" that "outlined the elements of the claim" would not be sufficient to save the claim from dismissal.

The Book Exchange's complaint was not legally inadequate for lack of detail, but because of the legal error in the contention that the credit arrangement is tortious. The circuit court reached the legal conclusion that despite The Book Exchange's characterization of Defendants' acts as "tortious," The Book Exchange did not "provide[] any allegations of fact that, if proved, are actually 'tortious.'" (*See* Order Granting Defs.' Motion to Dismiss

[hereinafter "Order"] at 7-8, Rec. at 315; *see also id.* at 9, Rec. at 316 (concluding that "neither the end nor the means of the Defendants' activities are unlawful or tortious, and the tortious interference claim fails as a matter of law").) In other words, the Circuit Court found that The Book Exchange's factual allegations, which were quite detailed, would not state any legal claim against Defendants. The circuit court did not accept as true the legal conclusions and characterizations of the complaint, but it accepted the detailed factual claims. The legal effect of the allegations, not the adequacy of detail in the pleading, was the matter at issue. In short, The Book Exchange confuses "alleging a tortious act" with "alleging that an action is tortious." The complaint fails to allege actions or events fitting within the ambit of what is "tortious interference," but instead repeatedly asserts the mere conclusion that the acts alleged are tortious.

The complaint's defects are not cured merely because it repeatedly recites the legal elements of tortious interference abstracted from case law. Had there been no more, there might have been some question whether discovery or a more particular statement of the claim was called for. The complaint, however, sets forth a detailed allegation as to the program at issue and its alleged effect on sales by The Book Exchange. There was, therefore, no doubt as to what actions formed the basis of the claim. The circuit court was not required to accept the barebones conclusory allegation that there was tortious interference when The Book Exchange gave a detailed statement of the allegedly tortious action – the credit arrangement at issue. *See Kopelman*, 196 W. Va. at 494, 473 S.E.2d at 914 (holding that there is no duty to accept the legal conclusion of a pleading). Similarly, the circuit court was not required to ignore the detailed information as to the allegedly tortious acts. Accordingly, the Circuit Court was able to determine as a matter of law that The Book Exchange failed to state a claim for tortious interference because it alleged nothing "actually 'tortious.'" (Order at 8, Rec. at 315.)

That is the key element: an act of "interference," rather than mere competition for customers. All parties agree that for a plaintiff to establish a *prima facie* case of tortious interference, it must show (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. and Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983). In this case, it is the "intentional act of interference" that The Book Exchange most clearly did not plead.[4] Certainly, courts in other jurisdictions have been willing to dismiss tortious interference claims in response to motions to dismiss when plaintiffs could not plead wrongful interference with legitimate competition. *See, e.g.*, *Peoples Sec. Life Ins. Co. v. Hooks*, 367 S.E.2d 647, 650-51 (N.C. 1988) (affirming Rule 12(b)(6) dismissal of tortious interference claim because defendant's allegedly wrongful acts were "justifiable interference"); *Emily's Cookie Mix, Inc. v. Cora Ltd. P'ship*, No. COA04-1630, 2005 WL 3046449, at *2 (N.C. Ct. App. Nov. 15, 2005) (unpub.) (affirming 12(b)(6) dismissal of tortious interference claim because plaintiff failed to allege facts demonstrating that defendant's actions were not prompted by legitimate business purposes).[5]

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[4] The Book Exchange also claims that "[*t*]*o the extent* that appellees' default program unlawfully diverts this future trade, as asserted, the first element of the tortious interference claim [a contractual business relationship or expectancy] is stated." (Appellant's Br. at 12 (emphasis added).) Thus, The Book Exchange concedes that its allegation of a business expectancy is stated only if it is correct that Defendants have unlawfully diverted trade. Because The Book Exchange cannot show unlawful diversion, it also cannot, according to its own (somewhat circular) conclusion, show a business expectancy.

[5] *See also, e.g.*, *Herron v. Principal Management Corp.*, 270 Fed. Appx. 455 (8th Cir. Mar. 21, 2008) (*per curiam*; unpub.) (summary affirmance of Rule 12(b)(6) dismissal of tortious interference claim); *Wolff v. Rare Medium, Inc.*, 65 Fed. Appx. 736, (2d Cir. March 14, 2003) (unpub.) (concluding that "the district court correctly dismissed the claims for tortious interference pursuant to Rule 12(b)(6)" because complaint failed to allege any facts supporting claim that defendant "was 'unjustified' or 'dishonest, unfair, or improper'"); *Chambers v. Cooney*, 535 F.Supp.2d 1255, (S.D. Ala. 2008) (applying New York law of tortious interference with elements similar to West Virginia's and dismissing tortious

The Book Exchange summarizes its contrary argument as follows: "Given the numerous means by which a plaintiff *may* establish unlawful or wrongful conduct in a tortious interference claim, the Book Exchange has stated a claim upon which relief can be granted, and dismissal of the complaint was in error."[6] (Appellant's Br. at 20 (emphasis added).) The Book Exchange's argument thus amounts to the contention that because it is *possible* to state a claim for tortious interference in many ways, in any complaint as voluminous as The Book Exchange's (and citing as many statutes), a party *must have* stated a claim for tortious interference.

These contentions, however, do not show that any statute actually was violated. In implicit recognition of the need to show unlawful action, The Book Exchange observes that its complaint "asserts that Barnes & Noble and WVU violated statutes, which are specifically set forth in count I." (Appellant's Br. at 15-16.) It then makes the erroneous leap that "[t]hese *assertions* serve as part of the basis for the allegations that appellees have engaged in improper and unlawful activities."[7] (*Id.* at 16 (emphasis added); *see also* Compl. ¶ 88, Rec. at 14-15 (alleging in support of tortious interference claim that "Defendants have violated West Virginia

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interference claim pursuant to Rule 12(b)(6)); *Knierim v. Siemens Corp.*, Civil Action No. 06-4935, 2008 WL 906244, at *17-*18 (D.N.J. March 31, 2008) (dismissing tortious interference claim under similar New Jersey and Illinois law because "the Amended Complaint reveals that it is devoid of any specific allegations *demonstrating* that [defendant] intentionally interfered with plaintiffs' prospective employment") (emphasis added); *Winter-Wolff Intern., Inc. v. Alcan Packaging Food and Tobacco Inc.*, 499 F.Supp.2d 233, 242-43 (E.D.N.Y. 2007) (dismissing tortious interference with business relations claim under New York law when plaintiff's complaint included only "conclusory" allegations of "improper pressure").

[6] The Book Exchange concedes that in order to be tortious, the alleged interference must be improper, *i.e.*, through "wrongful means." (Appellant's Br. at 16 (quoting RESTATEMENT (SECOND) OF TORTS).)

[7] In its Petition for Appeal, The Book Exchange stated that "[t]hese assertions *establish* that respondents have engaged in improper and unlawful activities." (Petition at 14 (emphasis added).) The Book Exchange now claims that the assertions merely "serve as part of the basis for the allegations" of tortious interference. The Book Exchange, however, has pointed to nothing in addition to the alleged violations in Count I that would support its tortious interference claim. Rather, The Book Exchange's change in language appears only to imply that other bases supporting its tortious interference are in the air, which is wholly insufficient to state a claim for tortious interference.

statutes through the implementation of the interface and automatic withholdings of student financial aid monies").) The Book Exchange simply is wrong. Conduct is not unlawful because The Book Exchange asserts that it is. Alleging that an act is tortious is not the same as alleging a tortious act.

The Book Exchange's obligation in its appeal brief was to set forth reasoned argument in support of its position that some statutory violation occurred. It did not do so, and, indeed, it provided no analysis of any kind on any statutory claim with the exception of a single illogical sentence in one footnote.[8] Although that failure alone would justify dismissal of the appeal, WVU analyzes in Section III.B.3, below, the statutory claims, and WVU establishes the lack of any statutory basis for alleging that the credit program is "tortious." Before turning to the statutory claims that The Book Exchange fails to address in its brief, WVU first addresses The Book Exchange's contentions that are non-statutory bases for finding the credit arrangement to be unlawful.

2. The Book Exchange Fails To Cite To Any Authority Showing That The Credit Program Was Improper.

Instead of identifying a concrete aspect of the challenged credit arrangement that transforms it from simple competition into unlawful tortious interference, The Book Exchange pursues three basic strategies. First, as discussed above, The Book Exchange characterizes or labels the arrangement (alleging that it is tortious, rather than alleging a tort). Second, it asserts generally (and without supporting argument) that some portion of the statutes must have been violated (a claim discussed in the next section). Third, The Book Exchange repeatedly asserts that there are many different ways in which an action can be tortious.

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[8] *See* Appellant's Br. at 17, n. 5. The claim – it is less than an argument – relates to W. Va. Code § 18B-10-14(c), and is discussed in Section III. B. 3.a, below.

The third point, though true, does not excuse The Book Exchange from identifying the specific way in which this challenged conduct actually is supposed to be unlawful or tortious. The very authorities on which The Book Exchange relies establish this. For example, the Oregon decision relied on by The Book Exchange recognizes that "a claim [of tortious interference] is made out when interference resulting in injury to another is *wrongful by some measure beyond the fact of the interference itself.*" *Top Service Body Shop v. Allstate Ins. Co.*, 283 Or. 201, 209, 582 P.2d 1365, 1371 (1978) (emphasis added). The Book Exchange also relies on the RESTATEMENT (SECOND) OF TORTS, because the Restatement acknowledges the multiple ways in which an action can be wrongful. The Restatement also acknowledges that merely depriving a competitor of business is not enough, as follows:

> One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule stated in this Section [that the only constraints are that the means not be wrongful or an unlawful restraint of trade] entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services.

RESTATEMENT (SECOND) OF TORTS, § 768 cmt b. In short, it is not wrongful to take customers from a competitor. Every successful competitive practice does that. There must be something unlawful or tortious about the means for tortious interference to exist.

Thus, while it may be the case that a tortious interference plaintiff need not *prove* all of the elements of a separate and independent cause of action (*see* Appellant's Br. at 19-20), the complaint must contain allegations that, if true, would show that a plaintiff's business was injured *by unlawful* means that invaded a right that it had. As this Court stated in *Transportation*

Co. v. Standard Oil Co., 50 W.Va. 611, 40 S.E. 591 (1902), which The Book Exchange cites with approval:

> Not only must the plaintiff have a right, but that right must be injured by the defendants, *and injured, too, by unlawful means, by acts which the defendants had no right to do*. You must establish that the defendants owed a duty to the plaintiff, and broke that duty to make an actionable tort. . . .The plaintiff had a perfect right to operate its business. So had the defendants the right to operate theirs. They both had right to compete for business. There is no right better established under the law of business than the right of trade competition.

50 W.Va. at 615, 40 S.E. at 592-93 (emphasis added).

The Book Exchange would have no legal argument that Defendants tortiously interfered if they kept the WVU bookstores open 24 hours per day at the beginning of each semester, although that would undoubtedly give Defendants a competitive advantage. Such a choice by Defendants could be said to divert trade from The Book Exchange, but absolutely nothing about 24-hour-per-day operations would be unlawful.[9] The Book Exchange could not transform the practice into unlawful interference merely by labeling it as such and claiming that it lost customers.[10] Similarly, The Book Exchange cannot transform the Reserve Convenience Account into unlawful interference merely by labeling it as "unlawful," "improper," or "wrongful."

The Book Exchange fails to show anything unlawful in establishing credit accounts by reserving $500 of a students' financial aid monies (out of potentially many thousands) and paying over any unused balance a few weeks after the beginning of a semester. Under federal

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[9] For this reason, The Book Exchange's argument that its sales increased when the Reserve Convenience Account was not in effect (Appellant's Br. at 14), in no way establishes that the Reserve Convenience Account is unlawful.

[10] As The Book Exchange makes abundantly clear in its complaint, it and Defendants *are* in legitimate competition. Defendants run a bookstore. The Book Exchange runs a bookstore. (*See* Compl. ¶¶ 7-12 & 33-38, Rec. at 2-3 and 6-7.) Defendants are privileged to influence the students' business (*i.e.*, the purchasing of textbooks), in which Defendants have an undeniable interest. *See, e.g., Bryan v. Mass. Mut. Life Ins. Co.*, 178 W. Va. 773, 780, 364 S.E.2d 786, 793 (1987).

law, the money is not due any sooner. The credit accounts may make it more convenient for financial aid students to purchase textbooks from Defendants, but the accounts do not *force* students to shop with Defendants or *prevent* them from shopping with The Book Exchange. First, students may opt out of the program. Second, those who do not opt out may use any or all of the rest of their financial aid award to shop at The Book Exchange. Third and finally, the students can use personal funds or credit cards, which now are ubiquitous, to make purchases at The Book Exchange. WVU's financial reserve plan is nothing more than a lawful means of competition identical to a decision to offer longer hours of operation for customers' convenience.[11] As the circuit court correctly observed, the "characterization or label placed on the actions alleged is irrelevant." (Order at 9, Rec. at 316.)

The Book Exchange also cannot transform lawful competition into unlawful interference by making false comparisons. Nothing about Defendants' contract or the Reserve Convenience Account is remotely similar to the types of conduct that were found to potentially support tortious interference claims in the cases that The Book Exchange cites.

For example, The Book Exchange notes that "[c]ontracts, statements, writings, and even public statements *may* serve as the basis for the intentional element of a tortious interference claim" (Appellant's Br. at 13 (emphasis added)), but it fails to note that such actions were not alleged here. Thus, the cases involving such actions are irrelevant. For example, in *Herman Strauss, Inc. v. Esmark, Inc.*, No. 5:07CV74, 2008 WL 313857 (N.D.W.Va. Feb. 4, 2008), the allegations were that the defendant obtained a replacement contract for the plaintiff's supply

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[11] If The Book Exchange's theory were to prevail, then every college's arrangements with regard to on-campus housing, on-campus food, and any other college-supplied service, would suddenly become "tortious interference" as to competing providers of services. Thus, University arrangements for on-campus housing could be challenged as tortious interference by landlords in the community. University arrangements for credit at University dining halls would be subject to challenge by McDonald's and by other local eating establishments.

contract with a third-party and publicly announced it. *Id.* at *3. Here, there is no remotely similar allegation. In *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000), discussed by The Book Exchange (at 17-18), the defendants intentionally kept the plaintiff towing company off of a rotated call list to serve stranded motorists. *Id.* at 968-69. That case, then, also is inapposite.

None of the other "multiple means by which wrongful or improper interference may be established" (Appellant's Br. at 18) is applicable here, either. In *C.W. Development, Inc. v. Structures, Inc. of W.Va.*, 185 W.Va. 462, 408 S.E.2d 41 (1991), a trade standard was used to evaluate defendant's conduct in poaching a salaried employee of plaintiff while the employee still worked for plaintiff.[12] 185 W.Va. at 466, 408 S.E.2d at 45. Here, The Book Exchange makes no argument that Defendants' conduct violated any trade standard. Violation of a statute or common law also *may* support a tortious interference claim. The alleged unlawful acts in *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978), however, were defamation (false statements about the quality of plaintiff's work) and threats of withdrawing insurance coverage. 283 Or. At 210, 582 P.2d at 1371. The Book Exchange's complaint in this case is devoid of any allegation of defamation or threats, and, as shown below, none of the alleged statutory violations of Count I actually state any violation against anyone.[13]

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[12] Similarly, in *Buffalo Wings Factory, Inc. v. Mohd*, No. 1:07cv612, 2007 WL 4358337 (E.D.Va. Dec. 12, 2007), cited by The Book Exchange (at 11-12), defendant allegedly poached plaintiff's employees in order to steal confidential information. *Id.* at *9. That conduct, along with intentionally attempting to convince customers that defendant's restaurants actually were plaintiff's restaurants, was the alleged wrongful interference. The Book Exchange makes no claim of stealing employees or trade secrets or any claim that WVU tried to convince students that its bookstore actually is The Book Exchange. *Buffalo Wings Factory*, thus, is inapposite.

[13] Accordingly, *Garrison v. Thomas Mem. Hosp. Ass'n*, 190 W.Va. 214, 222, 438 S.E.2d 6, 14 (1993), in which plaintiff relied on alleged defamation to support his tortious interference claim, is inapposite. Moreover, this Court was clear in *Garrison* that "defamation may, *in certain cases*, be a part of the interference," *id.* (emphasis added), but it did not state that any conclusory allegation of unlawfulness supports a tortious interference claim.

Similarly, while unethical conduct also *may* support a tortious interference claim, The Book Exchange's conclusory assertion that the Reserve Convenience Account constitutes unethical behavior (Appellant's Br. at 19 (quoting Compl. ¶ 87)) is not an allegation of actual unethical behavior. The Book Exchange's complaint contains no allegation or explanation of how the Reserve Convenience Account constitutes unethical business behavior, and no citation to any business code that has been violated. Indeed, if the Reserve Convenience Account were unethical, so too would be the now ubiquitous dedicated store debit cards, issued by nearly every major merchant.

There is, therefore, no non-statutory basis to support the contention that the credit arrangement is unlawful or wrongful. As shown in Section III.B.3, below, there is no statutory basis either.

3. The Complaint Does Not Allege The Elements Needed To Violate Any Of The Statutes On Which It Relies.

a. The Book Exchange states no violation of W. Va. Code § 18B-10-14(c).

West Virginia Code § 18B-10-14(c) states that "[e]ach governing board shall ensure that bookstores operated at institutions under its jurisdiction minimize the costs to students of purchasing textbooks." That statutory provision further elaborates that textbook costs may be minimized by governing boards establishing that textbooks be used for a reasonable number of years so that they may be repurchased and resold. W. Va. Code § 18B-10-14(c)(1)-(2). Clearly, the statute refers to internal actions by a university; it is not a mandate to foster competition with other businesses outside a university. Nonetheless, The Book Exchange alleges in its complaint that Defendants violated the provision because they "unlawfully divert[]" students from a competitor, namely The Book Exchange, and thus deny students the benefits of a "free market." (Compl. ¶ 44, Rec. at 8.) In its brief, The Book Exchange alleges that Defendants violate W. Va.

Code § 18B-10-14(c) "because the student cannot comparison shop and purchase textbooks at a lower price elsewhere." (Appellant's Br. at 17, n.5.)

This is The Book Exchange's only "explanation" as to how it believes that WVU has violated W. Va. Code § 18B-10-14(c). This position – to the extent it can be given a basis – assumes that West Virginia Code § 18B-10-14(c) is a mandate to assist competitors or at least foster competition outside of a university.

The actual text of the provision is entirely directed toward a university's internal conduct in "minimizing" the costs of its own textbooks. In this case, The Book Exchange makes no claim that the prices at WVU's bookstore are not sufficiently low (lower prices would hurt The Book Exchange, not help it), and nowhere does The Book Exchange allege that WVU has failed to provide for a used textbook trade, as contemplated by the statute.[14]

The theory of The Book Exchange proves too much. If WVU can violate the statute by any action that fails to direct students to the lowest priced competitor, then failing to direct students to use Amazon.com (or whatever discount site is least expensive), also "violates" the statute. Manifestly, this cannot be. The Circuit Court properly rejected this theory, and also properly found that the provision "does not explicitly give a right of action to any party." (Order at 5, Rec. at 312; *see also Hurley v. Allied Chem. Corp.*, 164 W. Va. 268, 278, 262 S.E.2d 757, 763 (1980) (setting forth the standard for an implied right of action).) Thus, the Circuit Court properly concluded that W. Va. Code § 18B-10-14(c) provides no basis for a tortious interference claim by a dissatisfied competitor.

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[14] The Book Exchange mentions in passing that its own prices are lower (*see* Compl. ¶ 44, Rec. at 8), but nowhere in the complaint or briefing does it suggest that this is a result of any improper action by WVU. Indeed, many colleges and universities have a policy of not pricing school-provided goods below the prices available from private retailers in their communities, so as to avoid harming those retailers' businesses.

b. The Book Exchange states no violation of the West Virginia Antitrust Act.

The Book Exchange's complaint alleges that the credit arrangement established by the Reserve Convenience Account program constitutes a violation of the West Virginia Antitrust Act ("WVATA") in four different respects: an unlawful conspiracy in restraint of trade in violation of W. Va. Code § 47-18-3(a) (Compl. ¶ 46, Rec. at 8); price fixing, in violation of W. Va. Code § 47-18-3(b)(1)(B); an allocation of markets in violation of W. Va. Code § 47-18-3(b)(1)(C) (*id.* ¶¶ 47-55, Rec. at 8-9); and attempted establishment of a monopoly in violation of W. Va. Code § 47-18-4 (*id.* ¶¶ 56-57, Rec. at 9-10). The credit arrangement established by the Reserve Convenience Account does not fit within any of these terms of art, nor has The Book Exchange alleged the actions necessary to state a claim under any of these antitrust theories. Accordingly, The Book Exchange's allegations of wrongful conduct under the WVATA do not actually state claims of wrongful conduct under that statute.

As an initial matter, WVU, an arm of the State,[15] is immune from antitrust liability under the "state action immunity" doctrine first established in Federal antitrust law. In a case by a competitor bookstore making claims similar to those of The Book Exchange, the court held: "The state action immunity exemption, frequently referred to as the *Parker* doctrine [based on *Parker v. Brown*, 317 U.S. 341 (1943)], stands for the proposition that the antitrust laws did not intend to prohibit the state as sovereign from imposing restraints on commerce." *Cowboy Book, Ltd. v. Bd. of Regents for Agric. & Mech. Colls.*, 728 F. Supp. 1518, 1520 (W.D. Okla. 1989)

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[15] The Court has expressly held that WVU is an arm of the State. *City of Morgantown v. Ducker*, 153 W. Va. 121, 125, 168 S.E.2d 298, 301 (1969) ("[W]ith impact to the business and affairs of the West Virginia University the board of governors acts for and in behalf of the State of West Virginia and in doing so exercises the sovereign power and authority of the State.") The vitality of that proposition was recently reaffirmed by the U.S. District Court for the Northern District of West Virginia. *See W. Va. Univ. Bd. of Governors v. Rodriguez*, 543 F. Supp.2d 526, 529-32 (N.D.W.Va. 2008) (citing *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 262 (4th Cir. 2005), and 34 other cases finding state universities to be arms of their respective states in finding that WVU is arm of West Virginia).

(concluding that that Board of Regents of Oklahoma State University was state actor immune from antitrust liability for extending credit to financial aid students in its school's bookstore).

The West Virginia Legislature adopted the immunity inherent in the state action doctrine in two ways. First, it directed that West Virginia antitrust law be construed consistently with comparable federal law. *See* W. Va. Code § 47-18-16. Second, the Legislature adopted "state action immunity" when it *excluded* the State from the definition of "persons" capable of violating the act, W. Va. Code § 47-18-2(a), but *included* the State and its political subdivisions within the special definition of "persons" entitled to sue under the act, W. Va. Code § 47-18-9. This explicit distinction in the definition of "person" must be given meaning. *See Kessel*, 220 W. Va. 602, 619, 648 S.E.2d 366, 383 (2007 (noting that a fundamental principle of statutory construction is *expressio unius*, *i.e.*, "the express mention of one thing implies the exclusion of another" (citations omitted)); *Bullman v. D&R Lumber Co.*, 195 W. Va. 129, 135, 464 S.E.2d 771, 777 (1995) (recognizing that "courts are not to add to statutes something the Legislature has purposely omitted"). State action immunity, alone, is a sufficient basis to find that WVU did not violate the WVATA (because it simply cannot violate the statute), and, thus, no alleged violation of the WVATA could support a claim that WVU tortiously interfered with The Book Exchange's business expectancies.

Even if WVU were not immune from antitrust liability, the Book Exchange still fails to state a legal claim (and, thus, fails to allege wrongful conduct) for "restraint of trade," "price fixing," "market allocation," or "attempted monopolization." All of those terms are terms of art in federal antitrust law, and this Court recently and expressly held that terms of art drawn from federal case law must be construed consistently with the federal law from which they are drawn. Syl. pt. 6, *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 648 S.E.2d 366 (2007).

The complaint, however, confines itself to reciting that the actions alleged constitute a violation of the statutory terms, but the complaint fails to allege the elements required for each of these long-standing antitrust claims.

For example, nowhere in its complaint does The Book Exchange allege that WVU has contracted or conspired with Barnes & Noble to actually control the price of a commodity, (presumably textbooks) which is a requirement in order to allege price fixing. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-23 (1940). The allegations of the complaint are simply that WVU has leased space to Barnes & Noble in which the latter may operate a bookstore, with WVU receiving guaranteed rental plus an additional percentage of sales over a target figure. (Compl. ¶¶ 33-37, Rec. at 6-7.) The Book Exchange makes no claim of an agreement that two *competitors* agreed on the prices they would charge for goods (or services), which is the hallmark of the *per* se violation that is horizontal price fixing. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Price-fixing between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of agreements that are *per se* unlawful"). The Book Exchange also does not allege – nor can it – that WVU and Barnes & Noble are *competitors* who have allocated markets, a necessary element of the market allocation claim.[16] (*Id.*) As to the monopolization claim, The Book Exchange's mere recitation of the language of W. Va. Code § 47-18-4 (Compl. ¶ 56-57, Rec. at 9-10) fails to set forth the established elements of a claim for attempted monopolization.[17] Finally, The Book Exchange

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[16] "[F]ederal antitrust law clearly defines illegal market allocation as the division of territories by competitors at the same level of the market structure to minimize competition." *Kessel*, 220 W. Va. 602, 620, 648 S.E.2d 366, 385 (2007) (citing *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972)). Plaintiff has alleged no agreement among *competitors* to allocate customers. The only agreement that Plaintiff raises is between WVU and Barnes & Noble, and they are not competitors.

[17] In order to state a claim for attempted monopolization, The Book Exchange must allege more than the bare language of the WVATA; it also must allege a dangerous probability of achieving monopoly

fails to allege an actionable restraint of trade under the "rule of reason" because it omits any allegation of a relevant market or that competition has been harmed (rather than a competitor).[18] Accordingly, as a matter of law, The Book Exchange has failed to state a violation of the WVATA that could support its tortious interference claim.

c. The Book Exchange states no violation of the West Virginia Electronic Mail Protection Act nor the West Virginia Consumer Credit & Protection Act.

The Book Exchange's complaint alleges (at ¶¶ 59-71, Rec. at 10-12) that Defendants violated the West Virginia Electronic Mail Protection Act ("WVEMPA"), W. Va. Code § 46A-6G-2, which prohibits unauthorized, fraudulent e-mail or bulk e-mail that satisfies one of four conditions, and the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code §§ 46A-6-101, *et seq.*, which similarly prohibits, *inter alia*, fraudulent representations to consumers. The Book Exchange alleges that Defendants violated these acts by sending e-mail messages to students advising them of the financial reserve plan and providing them with the opportunity to opt out. The Book Exchange identifies the e-mail messages about which it makes

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power in a relevant market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The Book Exchange, however, never alleges a relevant market, much less that Defendants could actually obtain and maintain a monopoly of one. Because essential elements – including allegations of the relevant market and that there is a dangerous probability of success in monopolizing that market – have not been pleaded, The Book Exchange's claim of attempted monopolization is defective.

[18] Any restraint of trade allegations requires proof of a relevant market and anti-competition effect on the market, unless the restraint alleged fits within the narrow "*per se*" categories of violation. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U. S. 2 (1984) (exclusive anesthesia contract with hospital held not a *per se* violation and plaintiffs failure to properly define relevant market mandated summary judgment); *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 575 (5th Cir. 1982) ("Under rule of reason analysis, the plaintiff must prove that the defendant's alleged conduct 'had an anticompetitive effect in the relevant product and geographic markets.'") (quoting *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir.1981)); *Rural Tel. Serv., Co. v. Feist Publ'ns, Inc.*, 957 F.2d 765, 768 n. 2 (10th Cir.1992) ("In defining the relevant market, two aspects must be considered: the product market and the geographic market."); and *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 111 (2d Cir. 2002) (upholding conclusion by the district court that "[b]ecause PepsiCo has failed properly to define the relevant market here, there can be no Section 1 violation under a rule of reason analysis.").

these complaints, and that is fatal to its claims. Nothing about the e-mail messages was unauthorized, fraudulent, or misleading as a matter of law.

The Book Exchange's complaint alleges that a November 29, 2005 e-mail notified financial aid students that that "an amount up to $500 has been reserved on account at the bookstore," and that a December 13, 2005 e-mail notified the students that the "account at the bookstore will be created automatically" unless they opted out by December 16, 2005. (Compl. ¶¶ 20, 22, Rec. at 4-5.) The Book Exchange then alleges that these messages are unlawful because (i) they omit reference to WVU's contract with Barnes & Noble, which would allegedly enable students "to realize that the program is truly for marketing and revenue purposes" and not for their convenience; (ii) the messages lead students "to believe that they are required to purchase their textbooks from Defendants or are otherwise forced to do so due to the lack of available textbook money to be spent at The Book Exchange; (iii) the refund of unused funds in not provided "until well after the start of the academic term;" (iv) and the e-mail is "confusing" because it "is forwarded to the students during or just before final exams" and requires action by them to opt out. (*Id.* ¶¶ 63-68, Rec. at 11-12.) All of these allegations of how WVU's e-mail messages violated statutes, however, are nothing more than The Book Exchange's *gloss* on their effect – its own conclusions or assumptions about the effects of the messages.

In addition, however, The Book Exchange ignores, and fails to allege, several explicitly required elements of a claim under the WVEMPA or the WVCCPA.

First, The Book Exchange does not allege that the e-mails to the students were "unauthorized" under the WVEMPA.[19] Indeed, it could not plausibly do so, as the students are *enrolled* at WVU.

Second, The Book Exchange complains of the e-mails as deceptive, but its conclusion on that point is a conclusion of law, and nothing more. There is no fraud or deception established in the e-mail messages as described in the complaint.[20] Thus, two required elements of a claim under the first set of statutory criteria of the WVEMPA (*see* W. Va. Code § 46A-6G-2) are absent from the complaint.

Third, the complaint fails to allege a violation of the second prong of the WVEMPA, because it (i) contains no allegation of false or misleading information *in the subject line* of any e-mail; (ii) fails to assert that e-mails were sent through the use of a third party's Internet domain name without permission or that the point of origin or mode of transmission was misrepresented; (iii) fails to allege (and could not allege) that the e-mails did not clearly provide date and time of transmission and the identity and return address of the sender; and (iv) fails to allege (again, as it could not) that WVU transmitted any "sexually explicit materials." (*See* W. Va. Code § 46A-6G-2.)

Finally and similarly, The Book Exchange points to absolutely nothing in the information conveyed in the messages that was untruthful, inaccurate, or misleading in violation of the WVCCPA. (*See* W. Va. Code §§ 46A-6-102(7)(B), (L)-(N).) The Book Exchange claims that the timing of the messages (at the end of a semester as finals were beginning) caused confusion

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[19] The statute gives a specific definition to "unauthorized": "Unauthorized for purposes of a bulk electronic mail message, means a bulk electronic mail message sent in quantity in contravention of the authorization granted by or in violation of the policies or contractual rights of the electronic mail service provider." W. Va. Code § 46A-6G-1(a).

[20] *See* Comp. ¶ 20, 22, Rec. at 4-5.

(Compl. ¶ 68, Rec. at 12), but this is mere opinion that the Circuit Court was not required to accept as true. *Kopelman*, 196 W. Va. at 494, 473 S.E.2d at 914.

In sum, The Book Exchange's allegations about the unlawfulness of WVU's e-mail messages under the WVEMPA and the WVCCPA are based on its mere suppositions or conclusions as to the messages. None of The Book Exchange's allegations concerning those Acts, however, actually states a claim of unlawful conduct (regardless of whether The Book Exchange would have standing to assert those claims) that could support its tortious interference claim.

d. The Book Exchange states no violation of the West Virginia Unfair Trade Practices Act.

The West Virginia Unfair Trade Practices Act ("WVUTPA") prohibits, *inter alia*, the secret extension of benefits to a selected or limited class of purchasers.[21] (W. Va. Code § 47-11A-3.) Although The Book Exchange claims that Defendants have violated the WVUTPA (Compl. ¶¶ 72-76), it alleges no actual violation of this statute (again, a defect that is in addition to its lack of standing to assert the claim).

First and dispositively, nothing is secret. The Book Exchange alleges only that "the program is *secretive*" because WVU allegedly failed to notify non-financial aid students of a service that is not designed for them. (Compl. ¶ 74, Rec. at 13) (emphasis added.) This allegation is entirely insufficient to allege that the program is actually secret, *i.e.*, that Defendants actively sought to hide the program. Indeed, it is absurd for The Book Exchange to allege a "secret" program when The Book Exchange's complaint describes the program in great detail,

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[21] West Virginia Code § 47-11A-4 imposes individual liability for violations of the WVUTPA, which is the basis for The Book Exchange joining Mr. Weese. (*See* Compl. ¶¶77-79, Rec. at 13.) As The Book Exchange now concedes that it has no independent claim for any violation of the WVUTPA, its complaint should remain dismissed as to Mr. Weese regardless of the disposition of this appeal.

cites to emails and the WVU website regarding it, and quotes from contracts between WVU and Barnes & Noble.[22]

Second, the alleged "privilege" of financial aid students being able to purchase on account at the WVU Bookstore is not a special service or privilege similar to a rebate such that it would violate W. Va. Code § 47-11A-3. The contrary rule would mean that any benefit extended to students and not the general public was a prohibited "rebate," under the statute (if it were also "secret"). The rule The Book Exchange would implicitly adopt would mean that scholarships awarded to only select students were unlawful "rebates." The statute clearly intends to prohibit secretly providing economic benefit to particular customers. Nothing about the program whereby financial aid students are permitted to buy on account provides them with a discount or rebate. They pay the same prices as other purchasers. Simply being able to buy on account at the WVU bookstore is not a special service or privilege within the meaning of West Virginia Code § 47-11A-3. If the contrary were accepted, *every* credit line or arrangement not extended to all customers would, if "secretive," violate the statutes. Accordingly, The Book Exchange's mere assertion of a WVUTPA violation fails to establish unlawful conduct that could support its tortious interference claim.

e. The Book Exchange states no violation of the West Virginia Uniform Commercial Code.

The Book Exchange alleges that Defendants violated West Virginia Code § 46-1-304, the provision of the West Virginia Uniform Commercial Code ("WVUCC") that imposes the obligation of good faith on parties to contracts subject to the WVUCC. (Compl. ¶¶ 80-83.) This

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[22] *See, e.g., Ideal Plumbing Co. v Benco, Inc.*, 529 F2d 972, 979 (8th Cir. 1976) (agreement between contractor and subcontractor to reduce bid was not "secret" when reflected in final contract); *Burge v Pulaski County Special School Dist.* 612 S.W.2d 108, 110 (Ark. 1981) (no "secret" discount when competitor "knew all the facts").

allegation, too, is off-base. Even if The Book Exchange could have shown standing to assert a WVUCC claim, the WVUCC's general duty of good faith "does not support an independent cause of action," but "merely directs a court towards interpreting contracts." W. Va. Code § 46-1-304, official cmt 1.[23] Thus, no one – not The Book Exchange nor students – could state a legal claim based on the generalized notion that Defendants' contracts with students "lack good faith and honesty in fact." (Compl. ¶ 83, Rec. at 14.)

Moreover, The Book Exchange's allegations are based on contract *formation*, rather than *contract performance* or enforcement. (*Id.* (alleging wrongful inducement to contract).) That is, the complaint is concerned with how the contracts are created, rather than how they are carried out. The WVUCC obligation of good faith, however, is imposed only on the "performance and enforcement" of contracts. W. Va. Code § 46-1-304. The Book Exchange, then, has not stated a WVUCC claim based on the "performance or enforcement" of any contract. For any or all of these reasons, The Book Exchange's purported WVUCC claim fails to establish unlawful or wrongful conduct that could support its tortious interference claim.

4. No Civil Conspiracy Is Alleged.

The Book Exchange's brief contains no argument or analysis in support of the request that this Court reverse the circuit court's order dismissing the civil conspiracy claim. On that basis alone, the unsupported request should be denied. Syl. pt. 9, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.") (*quoting* syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981)).

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[23] *See also id.* (WVUCC does not impose "a separate duty of fairness and reasonableness which can be independently breached").

In addition, the circuit court was plainly right. "Civil conspiracy" is fundamentally a "combination to commit a tort." *Kessel v. Leavitt*, 204 W. Va. 95, 128-9, 511 S.E.2d 720, 753-54 (1998) (citations omitted)). Where there is no tort, there can be no civil conspiracy. *Id.* (noting that the "cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff".)

C. The Dismissal Order Properly Dismissed The Claims With Prejudice.

None of The Book Exchange's arguments that its complaint should have been dismissed without prejudice (Appellant's Br. at 21-24) is supportable. First, the case that The Book Exchange cites for the proposition that a Rule 12(b)(6) can *never* be with prejudice, *Rhododendron Furniture & Design, Inc. v. Marshall*, 214 W. Va. 463, 590 S.E.2d 656 (2003) (*per curiam*), does not stand for that proposition. In contrast, Syllabus Point 5 of *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975), explicitly states that

> [i]n all future cases the dismissal of an action under Rule 12(b)(6) W. Va. RCP for failure to state a claim upon which relief can be granted shall be a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismissed without prejudice.

It is clear, then, that a Rule 12(b)(6) dismissal is *always* with prejudice *unless* it is specifically stated to be made without prejudice.[24] *Sprouse* abrogated a contrary rule appearing in the final phrase of Syllabus Point 4 of *United States Fidelity and Guaranty Company v. Eades*, 150

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[24] The Book Exchange also notes that the circuit court's opinion letter did not expressly state whether the dismissal was to be with or without prejudice. (Appellant's Br. at 20.) Given the holding in *Sprouse*, the presumption is that a dismissal order with prejudice was intended. The question of presumption is irrelevant, however, because the express language in the final order dismissed the complaint *with prejudice* under Rule 12(b)(6). (Order at 10, Rec. at 317.) The Book Exchange requested, through its objection to the proposed order, that the order be entered *without prejudice* and the circuit court expressly rejected that request by entry of the order with prejudice. (Objections to Proposed Order at pp. 6-10, Rec. at 226-230.) Hence, the language of the opinion letter is irrelevant.

W. Va. 238, 144 S.E.2d 703 (1965), where the Court had stated that 12(b)(6) dismissals are to be presumed to be without prejudice. 158 W. Va. at, 457-61, 211 S.E.2d at 694-96.

The Book Exchange hypothesizes that the *explicit syllabus* point of *Sprouse* has been silently over-ruled in *dicta* found in the *Rhododendron* decision. The *Rhododendron* decision – unlike *Sprouse* – does not state that it is overturning a prior precedent. The Book Exchange theorizes that because the body of the *per curiam Rhododendron* decision happens to quote *all* of Syllabus Point 4 of *U.S.F.&G.*, the express statement of *Sprouse* overruling a specific portion of that syllabus point has now been abrogated. In short, *Sprouse* has been silently over-ruled says The Book Exchange.

That is not how the Court reverses it own precedents. Although the Court referred to all of Syllabus Point 4 of *U.S.F.&G.* in *Rhododendron*, the *Rhododendron* case required for its decision only the first phrases of Syllabus Point 4 from *U.S.F.&G.* (the portions relating to whether a motion is properly considered as brought under Rule 12(b)(6) or 56). The last sentence of Syllabus Point 4 of *U.S.F.&G.*, as quoted in *Rhododendron Furniture*, is *dicta*. *See* 214 W. Va. at 466, 590 S.E.2d at 659.

The Book Exchange nevertheless claims that *Rhododendron* silently removed dismissals with prejudices from the Rules of Civil Procedure. This defies the rules themselves, and the practice of this Court. Since *Sprouse*, this Court has repeatedly recognized that dismissals under Rule 12 may be with prejudice, repeatedly upholding, or reversing, dismissals on the merits, with no hint that a decision under Rule 12 is incapable of being a final decision ("with prejudice"). *See, e.g., Messer v. Huntington Anesthesia Group, Inc.*, 218 W. Va. 4, 620 S.E.2d 144 (2005) (noting a circuit court's granting dismissal *with prejudice* pursuant to Rule 12(b)(6)), *Shaffer v. West Virginia Dept. of Transp.*, 208 W. Va. 673, 542 S.E.2d 836 (2000) (same), *Garrison v.*

Herbert J. Thomas Mem'l Hosp. Ass'n, 190 W. Va. 214, 438 S.E.2d 6 (1993) (same), *Adkins v. Miller*, 187 W. Va. 774, 421 S.E.2d 682 (1992) (same). The contrary position would revolutionize the Rules of Civil Procedure, and no such revolution is hinted at in *Rhododendron.*

Second, The Book Exchange is wrong that because it could not present evidence at the Rule 12(b)(6) hearing, dismissal should have been without prejudice. (Appellant's Br. at 22.) A Rule 12(b)(6) motion, of course, focuses only on the allegations of the complaint. Hence, evidence and discovery undertaken to obtain evidence, are both irrelevant to determining a Rule 12(b)(6) dismissal with prejudice. Moreover, the Book Exchange fails even to hint how discovery would have enabled it to state a claim or why the thousands of documents it had already received were inadequate.

Third, The Book Exchange's argument regarding a hypothetical dismissal pursuant to W.Va. R. Civ. P. 41(b) – which provides for involuntary dismissal of claims that plaintiffs fail to prosecute – simply is nonsensical. (*See* Appellant's Br. at 22-24.) Rule 41(b) states that dismissal under that section and all other dismissals, except for dismissals for lack of jurisdiction and improper venue, *are* adjudications on the merits (*i.e.*, with prejudice), unless the circuit court "otherwise specifies" in its order. (W.Va. R. Civ. P. 41(b).) The final order in this matter specifically states that dismissal is with prejudice, so it does not specify "otherwise." (Order at 10, Rec at 317.)

In addition, nothing in the circuit court's final order indicates that the legal basis for the dismissal was "analogous" to a dismissal for lack of jurisdiction pursuant to W.Va. R. Civ. P. 12(b)(1). The entire order expressly grants dismissal for failure to state a claim pursuant to W.Va. R. Civ. P. 12(b)(6). Even though *one basis* for dismissing *some* of the alleged statutory violations was a lack of standing, that does not somehow transform the entire dismissal into a

dismissal for lack of subject matter jurisdiction.[25] Certainly, The Book Exchange cites to no authority for the proposition that a defendant's Rule 12(b)(6) motion can be re-cast after the fact by its opponent, or that a circuit court must re-cast the motion into another mold, at the behest of the opposing party. In short, The Book Exchange's entire argument regarding dismissal pursuant to Rule 41(b) is completely unsupported.

D. The Dismissal Order Is Properly A Rule 12 Ruling, Not A Summary Judgment Ruling.

The third alleged error is that the hearing on the motion to dismiss was conducted as a summary judgment hearing and the complaint was dismissed under Rule 56 without allowing discovery. The Book Exchange alleges that the Circuit Court considered evidence and proffers at the hearing and applied summary judgment legal standards.

This contention fails for at least five reasons. First, there was no evidence of any kind introduced at the hearing on the motion to dismiss[26] (*see generally* Hearing Tr., Rec. at Vol. IV), and the letter opinion's reference to "proffers and evidence" was corrected to "proffers" in the final order. (Oct. 3, 2007 Letter at 1, Rec. at 318; Order at 1, Rec. at 308.) Second, the circuit court cites no evidence (or proffers for that matter) in its decision (or in the letter opinion) as the basis of any of its rulings. Third, the circuit court was certainly aware of what it was doing when it considered the motions to dismiss, and would know whether it had gone outside the pleadings

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[25] The Book Exchange mis-cites *Belcher v. Greer*, 181 W. Va. 196, 382 S.E.2d 33 (1989). (Appellant's Br. at 23.) Contrary to The Book Exchange's characterization, this Court did not hold that in *Belcher* that all dismissals for lack of standing generally must be without prejudice. Instead, the Court in *Belcher* noted that "it is *likely* that a dismissal *in the instant case* for lack of standing would constitute a dismissal for lack of jurisdiction *within* the meaning of Rule 41." *Belcher*, 181 W. Va. at 199 n.2, 382 S.E.2d at 36 n.2 (emphases added). In *Belcher*, plaintiffs' asserted lack of standing was curable. *Id.*, 181 W. Va. at 198-99, 382 S.E.2d at 35-36 (plaintiffs could, and did, pay back taxes and redeem land that was subject of trespass suit). In this case, The Book Exchange's lack of standing to assert some of its alleged statutory violations is not curable.

[26] The Book Exchange admits that it "was not able to present evidence to the circuit court at the 12(b)(6) hearing" (Appellant's Br. at 22). Of course, it did not seek to introduce evidence. The Book Exchange also does not allege that the Defendants presented any evidence.

to consider evidence. If the circuit court had determined that it needed to go outside the pleadings, it certainly was capable of seeking evidence and converting the Rule 12(b)(6) motion to a Rule 56 motion.[27] (*See* W.Va. R. Civ. P. 12(b).)

Fourth, The Book Exchange erroneously asserts that every usage of the word "find" by a court establishes that the court made a "finding of fact." (Appellant's Br. at 24.) A court may make "findings of fact," but a court may also "find" the legal argument of a party unpersuasive, or "find" that reliance on a case is misplaced, or "find" that a party is in error. Courts can (and do) "find" that allegations of a party do not state a claim under the law. None of the latter uses of the term "find" (or "findings") requires or suggests that a "finding of fact" has been made. These very common usages show only that the court has reached a legal conclusion (*e.g.*, "has found" that a party is in error or is not entitled to relief). In fact, this Court, which acts in an appellate capacity and does not ever make findings of fact, repeatedly uses the word "find" to state its legal conclusions. *See, e.g., Keefer v. Ferrell,* 221 W. Va. 348, 655 S.E.2d 94, 100 (2007) (interpreting an insurance policy and stating a legal conclusion as to policy meaning: "We find this definition of 'occupying' to be plain . . . ."); *State ex rel. Darling v. McGraw*, 220 W. Va. 322, 326, 647 S.E.2d 758, 762 (2007) (stating legal conclusion that mandamus was not proper in the words: "Finding that [the petitioner] has failed to satisfy the elements required for our issuance of a writ of mandamus, we decline to issue the writ sought by his Petition herein."); *Affiliated Const. Trades Foundation v. Public Service Comm'n* 211 W. Va. 315, 322, 565 S.E.2d

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[27] The Book Exchange's argument (at 25) regarding its "motion" to permit discovery – which was presented only after the circuit court notified the parties of its ruling on Defendants' motions to dismiss and during the finalization of the court's order – is meritless. The circuit court notified the parties that it was dismissing The Book Exchange's complaint as a matter of law based upon what The Book Exchange pleaded. There was no "Rule 56 hearing" for which The Book Exchange needed to "properly prepare." The circuit court was not required to honor The Book Exchange's request when it was clear to the court that the complaint *as pleaded* failed to state a claim.

778, 785 (2002) ("[W]e find that the PSC determination that Big Sandy is not a 'public utility' was erroneous as a matter of law.").

Fifth and finally, the applicable legal standard is the same to establish a cause of action whether it is being reviewed based on the pleadings under a motion to dismiss for failure to state a claim or after discovery under summary judgment. The dismissal order's citation to some cases involving summary judgment does not change the nature of the Circuit Court's ruling. The legal requirements for tortious interference are the same whether the context is a motion to dismiss or a motion for summary judgment. The requirement for "a probability of future economic benefit, not just possibility." *Southprint, Inc. v. H3, Inc.*, 208 Fed. Appx. 249 (4th Cir. 2006) (unpub.) is pertinent at both stages, as is the rule that more than "mere wishful thinking" is required, *Beydoun v. Clark Const.*, 72 Fed. Appx. 907 (4th Cir. 2003) (unpub.). The same is true for the requirement that the party must state an "anticipated business relationship with an identifiable class of third parties." *Lucas v. Monroe Co.*, 203 F.3d 964 (6th Cir. 2000). While The Book Exchange claims that the Circuit Court cited to *Lucas* to show that the Book Exchange "failed to prove" that requirement (Appellant's Br. at 26), the circuit court specifically stated in its dismissal order that "Plaintiff's *allegations*, even if true, do not *establish* an 'anticipated business relationship with an identifiable class of third parties.'" (Order at 8, Rec. at 315) (emphasis added.) Thus, the circuit court explicitly applied the Rule 12(b)(6) standard – it is proper to dismiss a claim under Rule 12(b)(6) when the allegations, assuming their truth, fail to establish the legal requirements of the claim.[28] Mere citation to summary judgment cases does

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[28] The Book Exchange (at 27) cites *Felman Production Inc. v. Bannai*, No. 3:06-0644, 2007 U.S. Dist. LEXIS 81365 (S.D.W. Va. Nov. 1, 2007), for the proposition that it need not state the potential business relationship to survive a Rule 12(b)(6) motion for a tortious interference claim. However, the facts in *Felman* are very different than this case. In *Felman*, a contractual employment relationship existed between the parties. *Id.* at 16-17. Moreover, the alleged expectancy interest in *Felman* was for the employees of the complainant. *Id.* at 18-19. The court denied the motion to dismiss and the argument

not, contrary to The Book Exchange's claims, mean that the Circuit Court converted the Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.

Furthermore, if The Book Exchange's argument is that some evidence was considered and thus the motion to dismiss was converted into a summary judgment motion, The Book Exchange has not identified what that evidence was or how it was harmed. The *Rhododendron* decision itself, on which The Book Exchange relies so heavily, upheld a dismissal order even though the circuit court considered matters outside the pleadings. 590 S.E.2d at 659. This Court *upheld* the circuit court's decision, despite lack of notice, because there was no harm. *Id.*

E. The Circuit Court Properly Dismissed The Complaint Without Leave To Amend.

Despite The Book Exchange's reference to a "motion" to amend its complaint (Appellant's Br. at 27), it never filed such a motion. The sole mention of amendment in the proceeding below was in the title and a *single line* of the objections by The Book Exchange to the *proposed dismissal order,* and even then the request was only as an alternative to re-filing the complaint or allowing discovery. (See Objections to Proposed Order, Rec. at 221.) The request was not properly presented to the circuit court as a motion to amend, and that alone is reason to deny relief on appeal.

Moreover, leave to amend a pleading is within the discretion of the trial court, the decision of which will be upheld unless the challenger shows an abuse of discretion. Syl. pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968). Where a plaintiff provides no basis for amendment of the complaint and the lower court denies leave to amend, the lower court does not abuse its discretion. *Id.* Here, the circuit court correctly determined that

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that the complainant must plead the names of its employees, the business relationship allegedly interfered with, and the potential business relationship. *Id.* In this case, The Book Exchange does not allege tortious interference with its employees nor that a contractual relationship of any kind existed between it and the Defendants. In this case, Appellant and Appellees clearly are business competitors.

The Book Exchange's allegations did not state a claim under West Virginia law. The Book Exchange did not present to the circuit court, nor does it present to this Court in its appeal brief, any new grounds, facts, or issues with which it would amend its complaint that are not covered by the original complaint. Accordingly, the circuit court did not abuse its discretion in "denying" the passing, unsupported request of The Book Exchange for leave to amend. *See Poling v. Belington Bank, Inc.*, 207 W. Va. 145, 529 S.E.2d 856 (1999) (finding no abuse of discretion for denying leave to amend where court correctly determined issues under West Virginia law, and Amended Complaint raised no issues not previously covered); *see also Bronx Legal Services v. Legal Services for New York City*, 78 Fed. Appx. 781 (2nd Cir. 2003) (unpub. "Summary Order") (affirming denial of leave to amend where lower court did not elaborate on its denial, but plaintiff gave no reason to amend, offered no proposed amendments or what allegations he might allege in amendment that would cure deficiencies, and simply requested leave at end of his brief in opposition to defendants' motions to dismiss); *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944) (finding no abuse of discretion for denying leave to amend where proposed amendment was not substantively different than the general allegations of the original complaint).

Furthermore, the essential facts of the present case between The Book Exchange and the Defendants are known and have been pleaded. The Circuit Court found that the facts *as pleaded* were insufficient to state a legal claim. Even now, The Book Exchange identifies no amendment that it seeks, nor does it hint as to how amendment would make its claims viable. A circuit court may reasonably deny leave to amend where a proposed amendment would be futile to the suit. *See Farmer v. L.D.I., Inc.*, 169 W. Va. 305, 308, 286 S.E.2d 924, 926 (1982). Because the facts

at issue in this case are known and already have been pleaded and were found insufficient by the circuit court to sustain a claim, it would be futile to allow leave to amend the complaint.

The Book Exchange equally improperly suggests that discovery should have been allowed to have "the appropriate opportunity to develop the 'sufficient basis' of its claim and the 'facts sufficient'" to state a claim. (Appellant's Br. at 28.) Such a request is not an appropriate alternative to dismissal for failure to state a claim in the complaint, because such a request makes sense only where factual support is needed to "flesh out" a claim. It is not proper where the *allegations* are detailed but are legally insufficient. A litigant does not have the right to go on a fishing expedition, searching for a viable claim among the records of its adversary. This is particularly true when, as here, The Book Exchange had extensive discovery – WVU produced over 2,800 documents in this case for review. There is no explanation at all by The Book Exchange as to how more documents would cure the inadequacy of its legal theories.

F. The Issues Relating To The Bond And To Dissolution Of The Preliminary Injunction Are Premature.

Previously, the Book Exchange requested in its opposition to the proposed order that "[a]ny dismissal order should leave the injunction in place for the Spring 2008 term." (Objections to Proposed Order at 12, Rec. at 221.) The Book Exchange now argues that the injunction had no practical effect after the Fall 2007 semester and that the Circuit Court erred in expressly dissolving the injunction in its order. (Appeal Br. at 29-30.) The Book Exchange's principal point with regard to the injunction issue is to preserve the issue of whether Defendants can recover damages under the injunction bond. The WVU Defendants understand that this issue is raised out of an abundance of caution in order to preserve the issue for future review. The WVU Defendants agree that these issues are not yet ripe for appeal, as they have not been

presented to the circuit court. The circuit court will have full opportunity to consider any argument on the issues in the course of the motion to recover under the bond.

However, if this Court believes the issues are ripe for decision, the Defendants are entitled to an award of damages and attorney fees under the injunction bond. West Virginia Rule of Civil Procedure 65(c) states that an injunction bond is "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been *wrongfully enjoined or restrained.*" W.Va. R. Civ. P. 65(c) (emphasis added). An injunction is deemed "wrongful" when the claims alleged by the plaintiff in obtaining the injunction are found to be without merit, *i.e.*, the defendant is found to be able to lawfully do that action the plaintiff sought restrained. *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.2d 1032 (9th Cir. 1994); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049 (2d Cir. 1990); *see also State v. Freeport Coal Co.*, 145 W. Va. 343, 115 S.E.2d 164 (1960); 43A C.J.S. *Injunctions* § 338.

It is not necessary that an injunction be dissolved for the person wrongfully enjoined to collect under the bond. The wording of Rule 65(c) does not require dissolution; the rule requires that the injunction be "wrongfully" obtained. Moreover, the rule cannot require, as The Book Exchange contends, that dissolution is required in every injunction, because then parties wrongfully enjoined by an injunction for a single day's activity could never collect under the bond. Indeed, any injunction for a short term or one-time event (allowing entry on land for a specific purpose, an order mandating or precluding participation in an event, etc.) would be effectively beyond the redress provided by Rule 65(c).

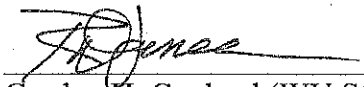
Up until the Circuit Court issued its order dismissing the claims and dissolving the injunction, it was the WVU Defendants' position that the injunction did not restrict any semester other than the Fall 2007. The WVU Defendants were prepared to argue this position against any

further relief sought by The Book Exchange. However, the WVU Defendants were mindful of the possibility for continuing effect of the injunction. Although the issue has not been addressed in this state, the general American rule is "that when an interlocutory injunction is granted until a certain day, or until further order, if no order is made upon the day named the injunction does not expire upon that day, but continues until actually dissolved by the court." *Boatmen's Nat'l Bank of St. Louis v. Cantwell*, 161 S.W.2d 431 (Mo. Ct. App. 1942) (quoting High on Injunctions). Hence, it was not in error that the Circuit Court expressly dissolved the injunction in its order, and given that the Circuit Court found that the Defendants had been wrongfully enjoined, the Defendants are entitled to collect damages and costs under the bond.

IV. CONCLUSION.

For the foregoing reasons, the WVU Defendants respectfully request that the decision of the Circuit Court of Monongalia County be affirmed.

Respectfully submitted this 29th day of August, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2008, I caused to be served the foregoing "Brief of Appellee," upon counsel of record by depositing in first class mail, postage prepaid, true copies thereof in envelopes addressed as follows:

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